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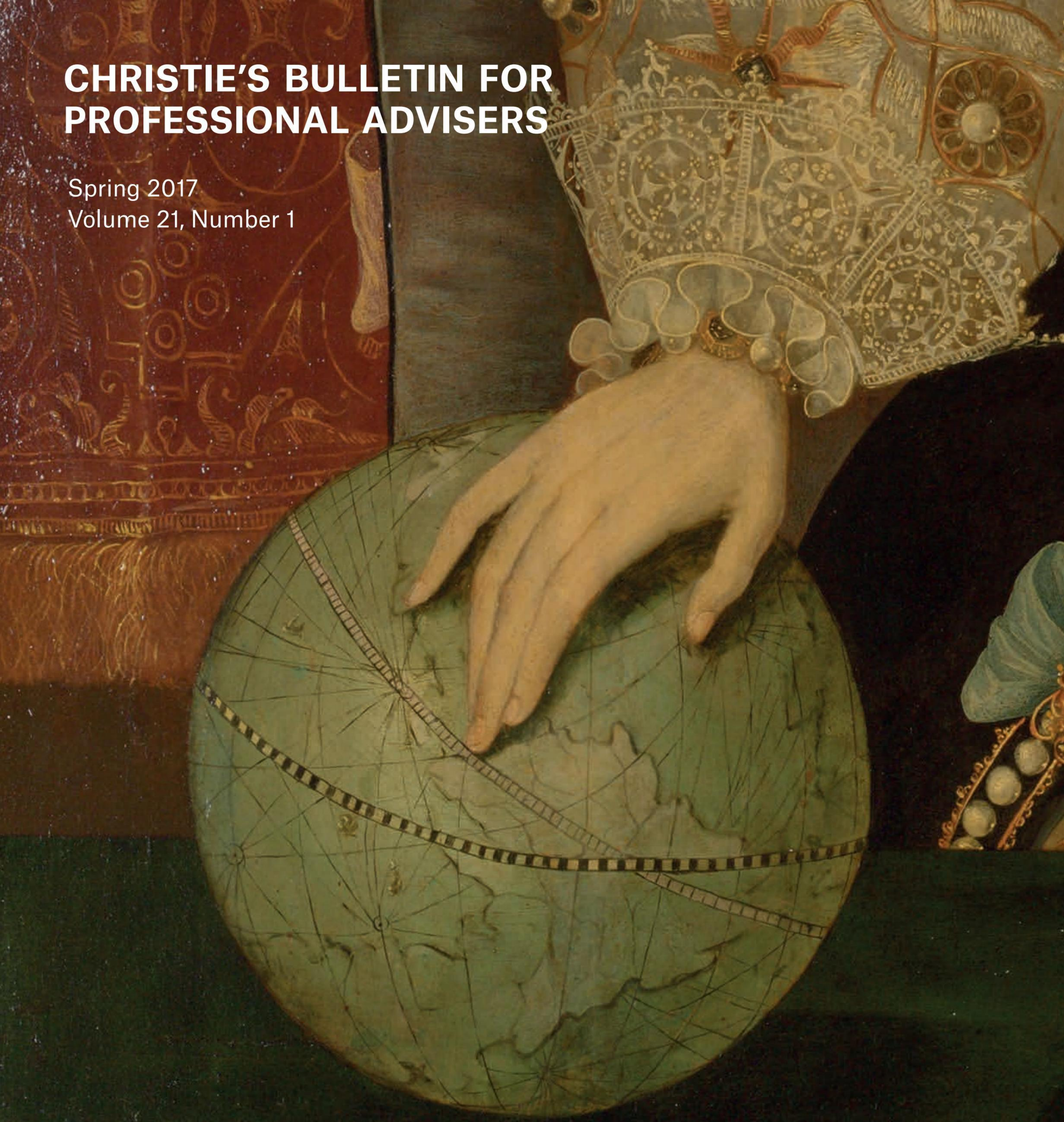

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HERITAGE & TAXATION ADVISORY SERVICE

Negotiated by Christie's and accepted in lieu of inheritance tax; permanently allocated to the Victoria and Albert Museum

FLORENTINE SCHOOL, C. 1495
Prospect of Florence from the Southwest
tempera and oil on panel
96 x 146 cm.

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Negotiated Sales • Heritage Exemptions • Lease of Objects
Cultural Gifts Scheme • Pre- and Post-sale Tax Advice • Other Tax Valuations

CHRISTIE'S

Frances Wilson
Christie's
Heritage & Taxation
Advisory Service

Editorial

The detail from the Armada Portrait of Queen Elizabeth I on the cover of this issue of *The Bulletin* shows the hand of the Queen resting on a globe, which is turned very deliberately away from Europe to show the New World. Following the results of last summer's referendum on membership of the European Union, the UK seems poised to do the same.

Since the referendum, many articles about Brexit's impact on the art market have featured in the arts and culture press. Issues raised include the obligation to account for artists' resale rights payments on a sale, and possible import duties or VAT. The museum sector has also raised concerns about its ability to recruit and retain staff if the free movement of people is restricted, as well as about potential cuts to funding.

Elsewhere in the news, armed conflict remains in the headlines, with associated reports of damage to heritage property. At long last the UK government has ratified The Hague Convention of 1954 and its First and Second Protocols. Sean Kelsey summarises the Cultural Property (Armed Conflicts) Bill and follows its journey to enactment.

In light of forthcoming legislation relating to non-doms, Fiona Graham provides an update on her article from the Summer 2012 issue of *The Bulletin* on Art and the Remittance Rules for Non-Doms.

We also have two articles by Alexis Ashot of Christie's Old Masters Department. The first article begins with the story of the recent negotiated sale of the Armada Portrait of Queen Elizabeth I to the National Maritime Museum, Greenwich, and goes on to give an overview of Christie's involvement with private sales to national institutions more generally. The second article takes a closer look at the portrait itself, summarising its history and providing a brief guide to its complex iconography.

As I'm sure you are aware, last year was the 250th anniversary of the founding of Christie's in 1766. The celebrations culminated in the publication of two books: *Going Once*, a survey of the firm's history told through 250 of the objects which have passed through its salerooms, and *Saved for the Nation 1991–2016*, marking the past 25 years of Christie's Heritage and Taxation Advisory Service. The latter volume focuses on one particular aspect of our work: negotiated sales to the nation. It features 25 portraits, from Hans Holbein's *A Lady with a Squirrel and a Starling*, sold to the National Gallery in 1991, to the Armada Portrait. The Appendix lists all of the objects – impressive in both quality and variety – which have been negotiated by Christie's over the past quarter of a century to enrich our nation's heritage.

Frances Wilson,
Editor

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Cover

ENGLISH SCHOOL, C. 1588
Portrait of Queen Elizabeth I (The 'Armada Portrait') (detail)
oil on oak panel · 110.5 × 127 cm.
in an English 18th century
carved giltwood frame

Negotiated by Christie's through private treaty sale to the National Maritime Museum, Greenwich

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Heritage News

Ruth Cornett
Christie's Heritage &
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Cultural Property (Armed Conflicts) Act 2017

In the last edition of *The Bulletin* I reported that the UK was to ratify the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, together with the protocols relating to it of 1954 and 1999. Although matters in the heritage sector do not always move swiftly, on this occasion, speed has been noticeable. After a delay approaching 63 years, the Cultural Protection (Armed Conflicts) Bill had its first reading in May 2016 and its second reading in November, passing to Committee stage very quickly. The Public Bill Committee stage finished on 15 November 2016 and Royal Assent was granted on 23 February 2017. This rapid progress indicates the all-party support for the legislation.

The new legislation introduces two new criminal offences: making cultural property the object of an attack, and dealing in cultural property which has been unlawfully exported from an occupied territory. An offender will be within the scope of the latter offence 'if they knew or had reason to suspect' that property was cultural property 'exported from an occupied territor'. Under the legislation, the lawfulness of the export will depend on whether or not it breaks the law of the relevant territory or falls foul of international law (which includes the Convention). A point for anyone involved in the art world is that any cultural property exported after 1956, when the First Protocol to the Convention took effect, will be subject to these provisions. The importance of thorough due diligence and provenance research in any transaction or commercial arrangement will soon have an additional imperative.

The ratification of the Hague Convention and its protocols has also prompted the armed forces to make plans to create their own team of 'Monuments Men', a specialised cultural property protection unit. This would be engaged with the armed forces wherever they are deployed, to protect cultural property. It is believed the UK armed forces will soon have their team in place ready for deployment anywhere worldwide.

Cultural Gifts and Acceptance in Lieu Report 2016

Arts Council England (ACE) published its annual report on the Cultural Gifts Scheme (CGS) and the Acceptance in Lieu (AIL) Scheme in December 2016. The total available budget for both schemes remains at £40 million of tax settled, although this year just over £26.6 million of that budget was settled through the two schemes. Although the schemes share the same budget, it is the AIL cases which take the lion's share, with around £26.3 million of inheritance tax settled via AIL. This year was also noticeable for the increased number of cultural gifts, 13 out of a total of 36 completed cases, although the total value of CGS in terms of tax settled from this and earlier years remains comparatively small. It is a feature of the CGS that individuals are permitted to spread the tax reduction over five years. The figures disclosed in 2016 thus reflect the total tax reduction for all CGS gifts agreed during the reporting year, and earlier cases where the tax has been spread. The amount of tax reduction in 2015–16 for CGS donations agreed in earlier years was £178,300, and the value of the tax settled in 2016 was just over £300,000. Two significant drawbacks to the CGS provisions are the inability to either carry back the tax relief to earlier tax years or amend the claim in later years should the donor's circumstances change. Both of these issues remain a discouragement to potential offerors.

This point has been made previously that the restrictions are disincentives for many would-be offerors, thus reducing the number of CGS cases; more flexibility with the allocation of the tax reduction through CGS would be very welcome.

The 2016 report makes the point that two of the AIL cases reported in the year were hybrid offers. This is the term given when the object offered has a higher tax settlement value than the tax liability and, in such circumstances, the gallery, museum or archive involved has to raise an additional sum in cash to ensure that the offerors receive full value from the objects. These cases take much longer to complete, as the acquiring institution almost inevitably finds that raising funds for the hybrid element means applying to the appropriate grant-making bodies and charities, as well as launching a public campaign. At the same time, the difficulty of establishing to the penny the amount due to the offeror for the hybrid element at the time of launching the offer means that the final sum cannot be ascertained until any issues affecting the tax liability for the rest of the estate have been resolved satisfactorily. Hybrid cases do, therefore, often take longer to conclude and can be more challenging for everyone involved, but should be borne in mind as an option by potential offerors.

New museum directors appointed

The resignation in July 2016 of Dr. Martin Roth as director of the V&A Museum came as a surprise to many in the heritage world, following so soon after the V&A's success in winning the award for Museum of the Year. Nevertheless, a successor has been found: the V&A's Board of Trustees announced in January 2017 that the new director will be Dr. Tristram Hunt, the historian and former politician. Commencement in his new position will coincide with major developments at the museum. We wish Dr. Hunt every success with these.

In January it was announced that Maria Balshaw would succeed Sir Nicholas Serota as director of Tate. Immediately prior to the appointment, Balshaw was Director of the Whitworth Gallery and Manchester City Galleries, and her appointment was widely tipped in advance. The appointment of the gallery's ninth director follows the decision by Sir Nicholas Serota to take up the part-time role of Chairman of Arts Council England on 1 February 2017. Maria Balshaw assumes her new post on 1 June 2017, and is the first woman to be appointed to the position. We wish them both every success in their new roles.

Heritage Counts 2016

Historic England published its annual report 'Heritage Counts' at the end of 2016. This report confirmed many of the findings that have been covered in previous Heritage Updates, in particular that there is a measurable benefit to health and wellbeing associated with participation in heritage and cultural activities. The report this year included an update on research undertaken in 2010 which measured the reactions of individuals to improvements in local areas where there had been significant historic environment regeneration. Perhaps it is not surprising that over 90% of participants said that such regeneration had made their locality a nicer place in which to live, socialise and work. In addition, such projects were found to have raised pride in local areas.

The most commonly valued parts of England's historic environment, defined as historically significant and important places worth saving, are country houses and castles, followed by monuments and memorials. The sense of 'belonging' to a place is enhanced significantly if it is a heritage or historic area with historic buildings. What is more interesting for the heritage sector is the result of the Heritage Lottery Funding study undertaken in 2015 (reported in Heritage Counts 2016). In that study, 93% of the interviewees said that they see heritage as important to the country. This view is supported by the result of earlier research provided in 2015 by ComRes, which interviewed 2,000 adults in Great Britain to establish the public perception of heritage. In that survey, 81% agreed that heritage contributed to attracting tourists; 73% thought that it benefitted the economy; and 61% agreed that it contributed to the creative industries.

In looking at the results of Heritage Counts over the last few years, clear patterns emerge: engagement with the heritage sector and support for it promote well-being, economic activity and regeneration of people and places.

Rebasing for 'Non-Doms'

The new rules affecting non-UK domicilaries come into force from 6 April 2017. The Government's response to the consultation was published on 5 December, and has been widely covered and reported by the professional bodies. For the heritage and culture sector, one of the key changes is the ability to rebase values to 5 April 2017, though this will only apply to those who become deemed domiciled under the long-term resident rules only and so will not apply to anyone formerly domiciled in the UK. There is a significant consideration for those affected by the changes to deemed domicile changes: rebasing will not apply if the asset was in the UK at any time between 16 March 2016 and 5 April 2017. It may be a useful tax planning opportunity for some clients, but evidence of location outside the UK will be needed to take full advantage of this opportunity. As ever, attention to record keeping will be essential.

In the draft Finance (No. 2) Bill published on 20 March, a relaxation of the rebasing rules was announced. Rebasing will be available (even if the chattels were in the UK during the period 16 March 2016 to 5 April 2017) if the remittance to the UK would have qualified under one of the other exemptions, such as temporary import or presence in the UK for repair; or is a personal asset (such as clothing, jewellery or a watch) and was used personally by the individual who is becoming deemed

UK domiciled; their spouse; or a minor child or grandchild.

More concerning is the change to the rate of rent paid for the use of works of art under the offshore benefit-in-kind rules. In the Government's response to the consultation paper, it proposed a fixed valuation procedure. This will take the acquisition price of the work and multiply it by the official rate of interest, but give a reduction for any costs incurred, such as insurance and storage. Any payments made for use would reduce the amount of the benefit. The rules would apply to all beneficiaries who receive capital payments from non-resident trusts, without regard to their tax status or whether or not the settlor is deemed domiciled. Currently the official rate of interest is set as a margin of 2.5% over base, which is 0.5%; the new proposals will give rise to a benefit charge of 3% of acquisition value unless costs borne by the beneficiary and any payment for use of the works of art by the beneficiary extinguish or reduce it.

The publication of the Finance (No. 2) Bill 2017 confirmed many of the provisions that the government announced in the initial draft documents. Although the draft legislation will not become law until given Royal Assent, no further major changes are expected. The valuation of benefits from trusts is being moved to a statutory basis and, as well as confirming the calculation of the benefit for the use of chattels described above, there will be a benefit for the use of residential property. This will be based on the rental value of the land, less any rent paid to the trustees and any amounts paid in respect of the repair, insurance or maintenance of the land. On a more positive note, the proposal to prevent the attribution of capital gains to non-UK residents who receive capital payments from an offshore trust has been dropped. The initial proposals would have created a situation where UK residents who receive capital payments from a trust would have been taxable on the full uplift in value of the trust assets. Clearly, as those UK residents may only have received a capital payment of part of the trust assets, that could have resulted in punitive tax charges. It appears that this proposal has been dropped, and that we will see the continuation of existing rules which serve to match capital gains with payments to beneficiaries wherever they are resident.

Co-ownership of works of art considered by the High Court

The issues of co-ownership and differences of opinion in the future of a collection were the subject of a case considered by the High Court in 2016. In a decision handed down by the High Court, the Court used the power available to it under s 188 Law of Property Act 1925 to direct how the chattels in the collection should be divided and distributed. The case of *Butler and another v Butler and another* [2016] EWHC 1793 (Ch) concerned an important collection of hundreds of 17th century Chinese pots, with a total value in the region of £8 million. Sir Michael Butler had collected these, and during his lifetime gave most of them to his four adult children in equal shares. The gifts were made formally, by execution of various deeds over the course of four years, but the children themselves did not enter any written agreement as to how they would share the collection.

The collection was kept together until 2013, when Sir Michael died. The two elder children subsequently asked to take possession of their shares, triggering the dissolution of the collection. The two younger children wished to preserve the collection for the purposes of study and exhibition, as it had become increasingly well-known and recognised as a form of reference collection for ceramics of the period. The elder children issued proceedings, and were ultimately successful in their claim for division. What makes this case interesting is that it is the first time that the power of the court could be physically implemented, with each child taking it in turns to choose an item from the collection until all the objects were distributed. In previous cases in which the same power had been invoked, the objects concerned could not be physically divided (the relevant cases concerned single items, namely a racehorse, a steam train, a car and a wrecked ship) and so the court ordered them to be sold and the proceeds divided.

The Butler case raises a number of key points for owners of works of art:

1. If gifting to individuals, rather than to a trust, there is no guarantee that the donor's wishes (for example to retain objects as a collection) will be respected. If this is important to a donor, then a gift to a trust is preferable.

2. The court did not decide whether to take a narrow view of the construction of s 188, as demanded by the claimants, or a broader view, as proposed by the defendants. The narrow view was that the court was only empowered by the statute to order a physical division, whereas the defendants said that the court has wide discretion and could make alternative orders, as had been done in earlier cases. This point remains unresolved, as the judge had no need to consider it (since physical division of the collection was possible). There were, however, remarks made obiter that if it had been necessary to consider the point, the court would have taken a broader view, and not limited itself to the division of the chattels between the parties.

3. The tax implications (each disposal triggered a tax liability for the other children) were not a relevant consideration, nor were the wishes of the donor relevant. Though the wishes did carry moral weight, they had no legal impact.

Regarding costs, this case also carries strong warnings for other donors and families where relations have broken down. As costs were not awarded to follow the event in entirety, the claimants had to bear 20% of their costs.

Support for museums and galleries in the Autumn Statement

The Autumn Statement by Chancellor Philip Hammond on 23 November 2016 was the last of its kind: henceforward the budget will be announced in the autumn, and a Spring Statement released in March. Among other measures announced was an extension of the scope of the new museums and galleries tax relief for exhibitions.

A significant barrier to many museums mounting exhibitions are the initial creative and set-up costs, which the new tax relief (heralded in March 2016) addresses. Relief is given at the rate of 25% for touring exhibitions, and 20% for non touring exhibitions. The relief is further restricted to a maximum of 80% of qualifying expenditure, which is also capped at £500,000. Together these restrictions mean that on an exhibition spend of £500,000, a gallery or museum could claim £100,000 for a touring exhibition (80% x £500,000 x 25%) or £80,000 for a non- touring exhibition (80% x £500,000 x 20%). This relief was to commence on 1 April 2017 but, following a public consultation, it was felt to be too restrictive, particularly favouring larger museums and galleries. A widening of the scheme was announced in the Autumn Statement. The relief will be available for five years, until April 2022.

A special grant was also announced to assist with the preservation of Wentworth Woodhouse, thought to be the largest privately owned house in the UK and one of Europe's largest stately homes. The history of, and problems associated with, the fabric of this building are well-known, and the grant of £7.6 million for emergency repairs is especially welcome. A grant under this scheme further depends on the production and approval of a sustainable business case.

Although the above support for the arts is pleasing, spending by the Department for Culture, Media and Sport will remain at the same level outlined in the 2016 Budget, when its overall budget was cut by 5%.

Spring 2017 Budget

The Chancellor delivered his last spring budget to the House of Commons on 8 March. The well-publicised, quickly withdrawn changes to the rules for self-employed national insurance contributions are outside the remit of this *Bulletin*. This last spring budget did not include any changes from the Autumn Statement measures that are relevant to the arts and heritage, and are covered elsewhere in the Bulletin.

2015/16 Report from the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA)

The RCEWA published its report for the year to 30 April 2016 at the start of 2017. The report details both the cases heard by the RCEWA during the year, and the outcome of cases heard in earlier years. There were 25 cases heard in the year, with the works of art and objects of cultural interest involved ranging from a Cezanne landscape to the robes and dagger owned by T. E. Lawrence, better known as 'Lawrence of Arabia'. Of these cases, the Committee found that 22 met at least one of the Waverley criteria, and were found to be national treasures. Normally, when an object or work of art is found to be a national treasure, the matter is referred to the Secretary of State together with a recommendation from the Committee that the issue of an export licence be deferred for a period of time to allow a purchaser who would retain the object in the UK to come forward with a matching offer to acquire it. During 2015/16 one application was withdrawn after the hearing, but before referral to the Secretary of State. The Committee has commented on this course of action in its report, and recommended that owners think very carefully about statements on their applications which are not in line with subsequent actions.

The report includes details of every case referred to the Committee. Of the 22 cases which met the Waverley criteria, 21 items were deferred by the Secretary of State in line with the Committee's recommendation. One case is still being considered by the Secretary of State, and one case has been suspended to allow for more information to be provided. In total, nine deferred items (with a total value of £7 million) were acquired by institutions or individuals for retention in the UK; six national treasures (with a total value of £37.5 million) were not saved and export licences were issued; and in four cases the licence application was withdrawn following submission of the Committee's recommendation to the Secretary of State. Set in the context of 10,585 applications for export licences – and that 34,999 items with a value of £1.48 billion were issued with export licences after being referred to expert advisers – the number of cases heard by the Committee is very small. While it may seem tedious to repeat these statistics, there are some points which can be made. The challenges to retaining Waverley objects of significant value remains; the licensing system tries to take the needs of the art market and considerations of all parties into account; the volume of works of art and cultural objects passing through the UK is high and, aside from all that, the individual cases make fascinating reading.

History of Art A-Level saved

The announcement that the last exam board to offer History of Art as a separate A-Level would be withdrawing it met with considerable press coverage. After a campaign by, amongst others, the Association of Art Historians and a number of university History of Art departments, the subject will continue to be offered at A-Level as a new examination from September 2017. Recognition of the important role that the arts and history of art play in personal, social and academic development is growing, and The Royal Society of Arts will conduct a series of trials to assess the impact of cultural education on the academic performance of disadvantaged children.

Owning Art in the UK: A Guide for Non-Doms

Fiona Graham
Boodle Hatfield LLP

Fiona is a Partner at leading law firm Boodle Hatfield. She advises UK and non-UK domiciled high-net-worth individuals on private client, tax and trust work. She provides expert tax planning in relation to chattels and historic buildings; conditional exemption claims on valuable pieces of art, purchases, gifts and leaseback sales; succession strategies for owners of art; and owners' and trustees' responsibilities for their art.

Fundamental changes to the taxation of resident non-domiciliaries (RNDs) will take effect from April 2017.

Once an individual has been resident in the UK for more than 15 tax years, he will be deemed domiciled in the UK for income tax, capital gains tax (CGT) and inheritance tax (IHT) purposes. This is a significant change for income tax and CGT, and a shortening of the current 17-year period for IHT.

For the first time, the RND will not be able to elect to be taxed indefinitely on the more favourable remittance basis. Taxation on the remittance basis broadly means that the RND is only taxed on foreign income and gains which are brought into or used in the UK where applicable on payment of an annual charge. Instead, once deemed domiciled, the remittance basis will no longer be available to the RND and he will instead be taxed in the UK on all foreign income and gains as they arise.

More drastically, a 'formerly domiciled resident' – a UK resident now domiciled outside the UK but who was born in the UK and has a UK domicile of origin (broadly, someone with a UK-domiciled father, or mother if his parents were unmarried) – will have no access to the remittance basis whilst he remains resident in the UK.

For as long as individuals qualify, there can still be considerable advantages for owners of artworks opting to be taxed on the remittance basis: any profits from sales of art owned outside the UK can be kept outside the UK tax net. However, as outlined below, care must be taken that a remittance is not inadvertently triggered when artwork is brought to the UK. Long-term residents will also now need to consider their position once they have become deemed domiciled, and some RNDs may consider owning art through a trust or trust company structure as an alternative to individual ownership.

Art and the remittance basis

If an RND brings works of art into the UK, a tax charge may arise on any foreign income or gains initially used to purchase them. There will be no remittance if the art was purchased from funds that have already been taxed in the UK or that arose prior to the individual becoming UK resident, or from other sources of 'clean' capital. Nor do the remittance rules catch assets purchased out of foreign income (excluding earnings) already owned at 11 March 2008, or works of art (and other assets) which were purchased afterwards but were already in the UK on 5 April 2008.

Where the purchase was funded in full or in part by foreign income and gains, it is those funds that are taxable if remitted, not the value of the art itself. Whilst this may be helpful where the value of the art has appreciated, if the value has gone down since purchase the RND may be taxed on a greater sum than the art is actually worth.

There are, however, various exemptions which allow art to be remitted without triggering an initial income tax or CGT charge. For instance, works of art (and other assets) can be brought to the UK for temporary purposes (up to 275 days in total) without triggering a remittance, as can assets purchased from foreign income or gains totalling less than £1,000. In addition, assets can be brought to the UK for restoration or repair or to be put on public display without triggering a remittance. The difficulty, however, is that these exemptions end whenever the art is sold, lost or stolen, and technically a remittance of the original purchase funds would be triggered at that point, as well as CGT on any profit arising on sale.

However, in a move designed to encourage sales of assets by UK auction houses, since 6 April 2012 a tax charge will not be triggered on the original income or gains used to purchase the asset if the proceeds are taken offshore or reinvested in a particular type of qualifying investment within 45 days of the sale proceeds (defined as purchase price minus any agency fees and other incidental costs of the disposal that were deducted prior to payment) being 'released'. The term 'released' is rather convoluted, but means the day on which the sale proceeds were first made available by the seller for the use or benefit of the owner (or any relevant person – see below). In practice, therefore, owners will generally have 45 days from receiving the proceeds of sale to take them offshore. If the proceeds are paid in instalments (e.g., because the value is very high), each instalment must be taken offshore within 45 days of that instalment being released. In exceptional circumstances, HMRC may agree to extend this 45-day period on request. The whole of the sale proceeds must be paid to the seller either in one tranche or in instalments by the first anniversary of 5 January following the tax year in which property ceases to be exempt.

There are, as one would expect, various anti-avoidance provisions and conditions which have to be met. Essentially, to qualify for this relief the sale has to be an 'arm's length' sale. Once sold, no 'relevant person', e.g., the owner, his spouse, minor children or grandchildren or a trust or company in which he is interested, can retain any sort of interest or benefit in the artwork. In other words, the sale must be a genuine commercial sale to a third party to ensure that no remittance is made. Similarly, agency fees paid directly or indirectly to a relevant person are not deductible. In case these measures prove ineffective at preventing non-commercial arrangements designed to avoid tax, there is also a 'catch all' provision that prevents the exemption applying if the sale is made as part of or as a result of a scheme or arrangement whose main purpose is the avoidance of tax. If an RND owner wants to sell a valuable artwork to a trust or company or a close relative, for tax reasons or perhaps simply because they would like to make a lifetime gift, great care should be taken not to trigger a remittance – if indeed this is achievable at all.

For a remittance of the purchase funds not to be triggered on sale, the proceeds have to be taken out of the UK in such a way that they can no longer be used or enjoyed in the UK in any way that would count as remitting income or gains. For instance, using untaxed foreign income and gains to pay for a service provided in the UK but to an offshore account (e.g., the RND's professional fees for advice relating to, say, a UK property) is still a remittance under the normal remittance rules. The other circumstance in which a remittance is not triggered is if the proceeds are reinvested in a type of investment that attracts a particular type of relief: Business Investment Relief (BIR) allows RNDs to bring unlimited funds to the UK broadly for investment in UK commercial trading companies without triggering a remittance. There were suggestions that the relief should be extended to allow the proceeds of a sale to be used to purchase other works of art in the UK, but unfortunately this was not taken up.

Further, and most helpfully, where works of art (and other chattels) are sold in the UK by an RND who is still able to claim the remittance basis, the resultant gain can be subject to the remittance basis (if appropriate) rather than being automatically subject to CGT. In practical terms, no CGT will arise where the proceeds are removed from the UK or reinvested within 45 days. Any gain will only become taxable if the proceeds of sale are subsequently brought back or otherwise used or enjoyed in the UK. This is potentially a very important concession as without it, even if the income or gains used to purchase the object were not taxable when it was sold in the UK, any profits would have been.

In addition, since 6 April 2013 no tax charge will arise if exempt property is lost, stolen or destroyed in the UK. Where compensation is received for such property, this will not be treated as a remittance so long as the entire payment is either taken offshore within 45 days or used to make a qualifying investment.

Long-term residents

From April 2017, once an RND has become deemed domiciled in the UK, he will be taxed on profits from sales of foreign artworks going forward as they arise. The remittance basis is no longer available to him. Perhaps surprisingly, however, this does not mean that remittance issues can be completely ignored when art is brought into the UK. Art purchased using untaxed income and gains will continue to be taxed on the remittance basis when brought to the UK or when an initial exemption (e.g., where brought to the UK for temporary purposes, restoration, repair or public display in the UK, etc.) expires (for instance because the art is sold, lost or stolen, as explained above), even if at that point the owner is taxed on the arising basis. Further, if the vendor has since become deemed domiciled in the UK, he will be taxed on the arising basis on any capital gain on a sale of artwork that had been exempted from the remittance rules, regardless of whether he takes the proceeds out of the country within that 45 day concessionary period. Please note that the above is the author's interpretation of the proposed new rules as drafted at the time of writing, but the final version of the legislation may result in a different outcome.

Long-term residents who will be deemed domiciled from 6 April 2017 may be able to benefit from re-basing on the sale of an artwork from that date where they have previously claimed the remittance basis and the asset was situated outside the UK between 16 March 2016 (or, if later, the date it was acquired) and 5 April 2017. Interestingly, and of particular application to art owners, there is a concession in the draft legislation whereby assets which are temporarily in the UK (to which one of the above exemptions applies) can also qualify for re-basing, provided the exemption does not expire triggering a remittance before 6 April 2017.

The ability to re-base is very helpful, as it will mean that only that part of the gain accruing after 6 April 2017 will be subject to CGT, although there may still be a remittance of the initial purchase funds. If re-basing does not apply, it may be better for the asset to be sold outside the UK, which is bad news for UK auction houses.

An alternative transitional relief is also available to RNDs who have at some point been taxed on the remittance basis (whether deemed domiciled under the new rules or not) and have purchased artwork from mixed funds, e.g., a mixture of clean capital income and gains. For a transitional period, 2017–18 and 2018–19 only, the art could be sold and the proceeds separated into their component parts so that the RND can remit the proceeds in the most tax efficient way (e.g., clean capital first).

Income tax and CGT are not the only taxes that the RND needs to worry about; even before he becomes deemed domiciled in the UK, if he directly owns UK assets worth more than £325,000 (in total), he will be liable to IHT at 40% on death (and in some cases on gifts), unless specific exemptions apply. It is therefore often advisable for RNDs who do not need or want to keep valuable art with them in the UK to keep it elsewhere anyway, or to utilise an offshore structure.

Once he becomes deemed domiciled in the UK for IHT (currently after 17 years, and from 6 April 2017 after 15 years) he will also be subject to IHT on works of art (and any other assets) which are directly owned by him anywhere in the world. These individuals may therefore like to consider owning their artwork – both that kept in the UK and that housed overseas – through a trust or corporate trust structure, and ideally setting up such arrangements before they become deemed domiciled. But this is not without its complexities, as the following section describes.

Owning art through an offshore trust structure

If the settlor transfers a work purchased out of foreign income or gains into a trust, or directly funds the trust's purchase of art out of these funds and that art is transferred to the UK, this may trigger a taxable remittance of the purchase funds (as the trustees are relevant persons in relation to them).

Additionally, it is important to understand that the income tax and CGT treatment of artworks owned by the offshore trust is different from that owned by individuals: the provision of an artwork to a beneficiary to enjoy in the UK (for instance, to hang on the walls of his/her home) amounts to a benefit provided by the trust. When an offshore trust provides a benefit to a beneficiary in the UK, an income tax or CGT charge can arise on the value of that benefit if it is matched with income/gains arising or which have already arisen in that trust.

The benefit accrues annually and is based on the value of the benefit rather than the whole value of the artwork. That benefit is then matched to any income and/or gains in the structure and an annual tax charge may arise. Even if the structure is 'dry' at the outset – so that there is no income or gains to 'match' to the benefit – any income/gains that subsequently arise can then be matched to benefits received in previous years, so a tax charge may arise at that later point.

To prevent the benefit from being matched to the user, he could pay a market rent to the trustees for use of the work. To that end, professional valuations would have to be obtained and a negotiation carried out on behalf of both the user and the trustees. At present, the rental valuation can in some cases be significantly reduced if the burden of use is placed on the beneficiary, such as responsibility for repair, insurance and security. The figures would, however, have to be carefully considered, as paying rent could prove more expensive than any tax bill,

depending on the value of the work and what other funds the trust generates. In addition, the payment of rent introduces income into the trust structure, which can then become taxable when matched to capital payments paid to and benefits given to any beneficiaries taxable in the UK, so this may be best avoided.

However, a recent government consultation has proposed changing the method of valuing the benefit of the use of art to the official rate of interest (currently 3%) multiplied by the acquisition price less any payments actually made by the beneficiary for use of that art including insurance and storage.

Turning to IHT, if the settlor retains a right to use the art (or other trust assets), he then risks any UK situs art being deemed to be in his estate for IHT on his death, if the gift with reservation rules cannot be circumvented. Further, a trust created since 2006 which owns art located in the UK will have an IHT exposure, on 10 year anniversaries/capital appointments, at a maximum rate of 6% based on the current value of the art.

If IHT is the main concern, a subsidiary offshore company could be inserted into the structure. Such company then owns the art directly. As the trust owns non-UK assets (the shares in the offshore company), no IHT charges arise and the gift with reservation rules are not in point. Even though changes will be introduced from April 2017 to prevent UK residential property owned in an offshore structure being outside the IHT net, these provisions do not extend to works of art, at least at present.

It should be noted that, again, formerly domiciled residents are subject to a harsher regime: from their second year of UK residence IHT trust charges will apply to all their trust assets (whether located in the UK or overseas). Additionally, if the settlor retains an interest in the trust and the gift with reservation rules apply, all the trust assets (both UK and foreign) may be deemed to be in his estate for IHT on his death.

Care must be taken by the trustees in allowing their beneficiaries to use the artworks. Where art is directly owned by trustees, a formal agreement is required, such as a Bailment Agreement, setting out the terms on which the beneficiaries are in possession of the trust property, such as who pays for insurance.

If, instead, a corporate structure is utilised, whilst one might expect that the beneficiary can be benefitted in the same way, due corporate process must be followed. A company cannot decide to allow a third party free or non-commercial use of its assets; the directors have a fiduciary role, and why would it be in the interests of their shareholders to allow such free use of its assets? In practice, the trustees would need to decide (and formally resolve) in their capacity as company shareholders to confer a benefit on one of the trust's beneficiaries, and formally direct the directors of the company to allow that beneficiary to use the art free of charge. The company would need to ensure that their governing documents allowed them to use assets in this way, and may also need to seek advice based on the laws of its jurisdiction of incorporation on such process. As the corporation is the owner of the artworks, it is that entity which then needs to enter into a Bailment Agreement directly with the user.

Critically, aside from tax aspects and irrespective of whether a corporate structure is interposed, trustees also have the usual fiduciary duties in relation to the artwork. Broadly this means that they must manage the works professionally and treat them like an investment, as they would any other trust asset. They need to obtain regularly updated valuations to identify the best strategy for the trust in order to maximise its assets and to act in the best interests of its beneficiaries. This may not be appropriate or possible if an individual simply wants to enjoy his art in the UK on his own terms.

Christie's Private Sales to Museums

Alexis Ashot
Christie's Old Masters Department

Alexis is the Head of International Private Sales in the Old Masters Department at Christie's. He has been involved with some of the most exciting works of art sold by Christie's during his 10 years in the department, including the Armada Portrait. In addition to advising private clients worldwide on their 'collection building', he has curated Christie's exhibitions such as The Bad Shepherd, and his research has contributed to several major rediscoveries in the field.

On 29 July 2016, Christie's was able to announce the sale of the historic Armada Portrait of Queen Elizabeth I. One of the most elebrated and widely–published works of British art, the 16th-century painting was secured for Britain after months of campaigning, through a private sale negotiated by Christie's.

Its acquisition by Royal Museums Greenwich was supported by grants and donations in excess of £10.3 million, including, amongst others, £7.4 million from the Heritage Lottery Fund, £1 million from the Art Fund, and more than 8,000 individual donations from members of the public. The fundraising campaign was launched on 23 May 2016, catalysed by an initial commitment of £400,000 by Royal Museums Greenwich and the pledge of £1 million from the Art Fund. The painting went on display in Greenwich on that date, accompanied by a sophisticated publicity campaign with resonance worldwide. Following the success of the campaign, it remained on view as the centrepiece of the grand reopening of the Queen's House, Greenwich, in the autumn, and was only removed from public view for essential conservation in January 2017.

This much is public knowledge. Behind the scenes, however, the process had begun years earlier, and was the fruit of Christie's longstanding relationship with the family of the previous owners, which gradually culminated in the events leading to its transition into public ownership.

For as long as can be traced, the painting had belonged to a family descended from the Elizabethan naval hero Sir Francis Drake, and may even have belonged to Drake himself – perhaps presented to him by the Queen. It might even have been commissioned by Drake in her honour. The momentous occasion of its sale was the first known change of hands in its 425-year history.

Although other versions of the portrait exist, including one belonging to the Duke of Bedford at Woburn Abbey, the Drake version is the only complete record of the composition. It is arguably the earliest and most fascinating of them all, partly because of its direct connection (through Sir Francis Drake) with the event the portrait commemorates (the defeat of the Spanish Armada in 1588), and partly because of its closer relationship with the most famous artist of the Elizabethan court, the miniaturist Nicholas Hilliard. The 'softer' features of the Queen in the Drake version (compared with the strikingly 'hard' features she is given in the Woburn picture) echo the only pronouncement of her personal artistic tastes with which Elizabeth is credited, in a conversation recorded by Hilliard himself in his *Treatise on the Arte of Limning* (written circa 1600).

It is unknown who painted any of the versions; Nicholas Hilliard has at times been suggested as the author of the Drake picture, while his court rival Sir George Gower was long considered the author of the Woburn picture. Both artists were amongst the first known native-born British court painters of the Renaissance, and Hilliard has been described as one of the greatest British artists of all time. It is possible that the new research and scholarly scrutiny which will come about as a result of the acquisition of the Drake Armada Portrait by a public institution may lead to new breakthroughs in the question of who painted these immensely important works.

In all respects, the fact that the work was secured for a national institution is to be celebrated. It precludes the possibility that this most significant artefact of British history and culture could be acquired by a foreign buyer, which was a real possibility before Royal Museums Greenwich made clear their interest in the picture.

REMBRANDT HARMENSZ.
VAN RIJN (1606–1669)
Portrait of Maerten Soolmans
oil on canvas
210 x 135 cm.
Painted in 1634

REMBRANDT HARMENSZ.
VAN RIJN (1606–1669)
Portrait of Oopjen Coppit
oil on canvas
210 x 135 cm.
Painted in 1634

From this point of view, it is particularly fortuitous that the fundraising campaign took place in 2016, when patriotic sentiments in the UK were running high; with British victories in the Olympic Games and, for better or for worse, the excitement of the Brexit referendum. Above all, the acquisition of the most recognisable image of Queen Elizabeth I in the 90th-birthday year of Her Majesty Queen Elizabeth II has a beautiful symmetry, calling to mind Sir Winston Churchill's words at the time of Her Majesty's accession:

'Famous have been the reigns of our queens. Some of the greatest periods in our history have unfolded under their sceptre. Now that we have the second Queen Elizabeth, also ascending the Throne in her twenty-sixth year, our thoughts are carried back nearly four hundred years to the magnificent figure who presided over and, in many ways, embodied and inspired the grandeur and genius of the Elizabethan age.'

Appropriately, the new home of the Drake Armada Portrait is in the Queen's Presence Chamber of the Queen's House, Greenwich. A masterpiece of the English Late Renaissance by Inigo Jones, the first significant British architect of the early modern period, the Queen's House was built in 1616 on the site of the original Greenwich Palace – the very birthplace of Elizabeth herself.

Private sales have long formed part of Christie's activity in the art market. The negotiation of Sir Robert Walpole's collection of Old Master Paintings from Houghton Hall in 1779 to Catherine the Great was one of the first in what would become a series of celebrated transactions. The sale included works by Velázquez, Rubens and Rembrandt – a collection which went on to form the core of the Hermitage Museum and was temporarily returned in 2013, with Christie's support, for an exhibition at Houghton Hall in the spirit of international art diplomacy.

With the developing social and technological changes of the late 20th century, it became increasingly apparent that the major auction houses were no longer as dependent on the trade for direct access to the majority of end buyers, and it has become increasingly evident that a gradual transition to include a larger proportion of 'retail' sales to private buyers was inevitable. Results announced recently by Christie's have, once again, demonstrated the appetite from our clients to buy and sell privately – the bespoke nature of these sales being a key factor in our clients' decisions to transact outside of the auctions. Private Sales also do not revolve around a sales calendar; although the auction sale weeks offer significant opportunities for us interact with our clients, private sales occur throughout the year.

We now have dedicated Private Sales specialists and business managers in every major department. Most of the members of these Private Sales teams were recruited from amongst longstanding employees with extensive experience of the auction channel, rather than from art retail firms external to Christie's. The result has been the emergence of a new and unique culture, a fusion between the more intensive client attention required for Private Sale transactions and Christie's traditional values of responsibility, discretion, transparency and expertise, as applied to a global corporate reach. This combination has set Christie's Private Sales apart from the

JACOB VAN RUISDAEL (1628–1682)
Edge of a forest with a grainfield
oil on canvas
103.8 x 146.2 cm.
c. 1656

REMBRANDT HARMENSZ.
VAN RIJN (1606–1669)
Portrait of Oopjen Coppit (detail)
oil on canvas
210 x 135 cm.
Painted in 1634

traditional auction channel, which persists as Christie's core business, and from outside dealers and galleries, for whom Private Sales can be a useful conduit for the most exclusive works of art.

One of the most significant contributions of the Old Masters team's efforts over the last five years has been its consistent involvement in bringing to market major museum-quality works, and the match-making of these works with public institutions in the UK and abroad. These include the most expensive Old Master paintings in history: the exceptional full length portraits by Rembrandt from the Rothschild Collection. Purchased for €160 million, they are the first ever joint acquisition by the French and Dutch states. The *Portraits of Maerten Soolmans and his wife Oopjen Coppit* were executed in 1634, a year after the couple's wedding.

An agreement struck between the French and Dutch states means that the pair will always be shown together, alternately at the Louvre and the Rijksmuseum. Other notable sales to museums have included Jacob Ruisdael's *Edge of a Forest with a Grainfield* to the Kimbell Art Museum, Texas, and Charles Le Brun's magnificent *Portrait of Everhard Jabach and his family* to the Metropolitan Museum – which also acquired Duccio's *Madonna and Child* from Christie's in 2004. The quality of the works sourced through Private Sales is also evidenced by the many which are sold to private clients and then placed on long-term loans to institutions the world over. Recent examples include an early masterpiece by William Hogarth, *The Christening*, the purchaser of which is placing it on loan at the Portland Art Museum, Oregon; and an exquisite early Flemish panel by The Master of 1518, which is being lent by its new owner to the Groeninge Museum, Bruges.

Another aspect of Christie's Private Sales activity has been the curation of thematic selling exhibitions that unite a broad range of disciplines and media. The Bad Shepherd exhibition in 2014 bought together works by members of the Brueghel family and circle, interspersed with contemporary reflections on their art by artists such as Jeff Koons, Sarah Lucas, Neo Rauch, Peter Doig and Jeff Wall. Simultaneously, a major exhibition in Hong Kong juxtaposed Asian, Classical and Contemporary works. On several occasions, such exhibitions have garnered positive critical response for bringing works which are otherwise hidden in private collections to a wider public.

In recent years the Old Masters Private Sales team has taken on a new and more focused role, seeking to concentrate on higher-end private sales in the years to come. We look forward to this new period with confidence and excitement for the beautiful works of art waiting to emerge from private hands.

The Armada Portrait

Alexis Ashot
Christie's Old Masters Department

Alexis is the Head of International Private Sales in the Old Masters Department at Christie's. He has been involved with some of the most exciting works of art sold by Christie's during his 10 years in the department, including the Armada Portrait. In addition to advising private clients worldwide on their 'collection building', he has curated Christie's exhibitions such as The Bad Shepherd, and his research has contributed to several major rediscoveries in the field.

'I know I have the body of a weak, feeble woman; but I have the heart and stomach of a king, and of a king of England too, and think foul scorn that Parma or Spain, or any prince of Europe, should dare to invade the borders of my realm; to which rather than any dishonour shall grow by me, I myself will take up arms, I myself will be your general, judge, and rewarder of every one of your virtues in the field.

'I know already, for your forwardness you have deserved rewards and crowns; and We do assure you on a word of a prince, they shall be duly paid...'

Elizabeth I, *Speech to the Troops at Tilbury*, 9 August 1588 [OS].

The Drake Armada Portrait is the prime version of the definitive image of Queen Elizabeth I, a monarch whose reign is considered a Golden Age in English history: the age of Shakespeare and of the birth of what would become the British Empire. The daughter of Henry VIII and his second consort, Anne Boleyn, Elizabeth completed the establishment of an English Protestant Church, a process begun by her father's break with Rome, while successfully initiating a tradition of religious tolerance which gradually ended decades of bitter persecution of Catholics by Protestants and vice versa. In a reign that lasted 44 years and 127 days (one of the longest in British history), Elizabeth deftly negotiated the tortuous politics of conflicting factions in Britain and abroad, giving England a longer period of domestic peace and stability than had been seen in centuries. One of the first female sovereigns of the modern period to rule any country in her own name, Elizabeth became the focal point for the ardent admiration and patriotism of her subjects, achieving an almost cult status by the end of her life. Famously known as The Virgin Queen, she never married, initially in order to use her eligibility for international diplomatic leverage, and eventually to ensure the independence of the sovereignty of the English Crown. The last of the Tudor dynasty, Elizabeth's foresight paved the way for the Union of England and Scotland by ensuring the succession of her cousin's son, James VI of Scotland, as James I of England, effectively creating Great Britain as we know it today. The Elizabethan Age witnessed unprecedented achievements in many branches of learning and industry, often under her patronage or that of her courtiers, and can be considered the high point of the English Renaissance. It was during her reign that England produced the first generation of native-born artists who could rival the Renaissance achievements of their Continental contemporaries; a superlative example of the new English School of painting is this work, known as the Armada Portrait.

This likeness belongs to the climactic moment of Elizabeth's reign, when the English defeat of the Spanish Armada in August 1588, against seemingly impossible odds, heralded the beginning of the age of English dominance of the seas. This dominance would last into the 20th century, enabling the establishment of a far-flung network of colonies over which 'the sun never set'. The victory over Catholic Spain and the mighty Hapsburg Empire was seen as a divine gift, validating the new English Church as a whole and the person of its Supreme Head, Queen Elizabeth, individually. It was met with national celebration and euphoria, and catalysed a push for further naval development that would soon lead to the permanent settlement of the North American East Coast. This push led, ultimately, to the birth of the United States, whose founding ideals of tolerance and aspiration can be traced to the spirit of the Elizabethans. In fact, the American doctrine of Manifest

ENGLISH SCHOOL, C. 1588
Portrait of Queen Elizabeth I
(The 'Armada Portrait')
oil on oak panel
110.5 × 127 cm.
in an English 18th-century
carved giltwood frame

Destiny can be seen to begin almost in the very moment of 1588, the natural extension of the widespread belief that a Divine Wind had helped scatter the Armada and give English ships the victory. These ideas, and the very self-definition of the Elizabethan state, are embedded in the design of the Armada Portrait. It is arguably the only true *state* portrait painted of the monarch in the whole of her reign, and possibly the only likeness over whose iconography the state exercised direct control.

Art historians consider the Armada Portrait to be one of the most important single works in five thousand years of British art, and a defining image of 16th-century history. It is frequently invoked as a key illustration for numerous developments and currents in the history of art. It introduced a new compositional format to English painting: the horizontal half-length single portrait, which affords the artist sufficient space to make complex statements about the sitter, while simulating a greater feeling of access or intimacy than is possible in a full-length. The artist uses this space to deploy an array of attributes which together carry a powerful message, making the picture a classic example of Renaissance humanist iconography. It has been seen as exemplifying a uniquely English, Elizabethan way of seeing the world and organising knowledge in a visual way. The portrait embodies an important transformation in the use and nature of images in England, with symbols of the state acquiring the devotional status previously reserved

almost exclusively for religious icons. It is also important as the portrait of a woman and a female monarch, and has proved fascinating to scholars for its negotiation of the traditional traits of femininity balanced with those of absolute, superhuman power. It is of great interest for the idiosyncrasy of its style, as one of the earliest examples of a large-scale work in oils by an English artist. There is a definite connection to the two most important native painters of the age, George Gower and Nicholas Hilliard, and growing evidence to tie it to Hilliard, who has been called the greatest English artist of the two centuries before Hogarth. Finally, it is a priceless historical document which summarises the entire history of English civilization as it stood in a watershed year – 1588 – and, by expressing the hopes and aspirations of that time, foreshadows major developments to come.

The Armada Portrait is regarded as one of the most important representations of the English Renaissance, and regularly appears in textbooks and teaching curricula for three separate humanistic disciplines: history, art history and English literature. Depicting Elizabeth I with a wide array of attributes, from the pearls in her dress to the globe on the table, the portrait is frequently cited as an example of the way in which Early Modern artists used symbolism and iconography to encode complex meaning. Unsurprisingly, given the rich scope it affords for interpretation, the Armada Portrait has been enlisted to support arguments from almost every critical approach, ranging from traditional connoisseurship to social history, from formalism to psychoanalysis, from classical feminism to postmodern critique.

As befits one of the most famous images in art history, the Armada Portrait has had a fascinating afterlife in popular culture. The life and reign of Elizabeth I have inspired many screen incarnations, and as these invariably celebrate the Queen's elaborate wardrobe, the dress worn in the Armada Portrait has been explicitly quoted more than once. It has become perhaps the most iconic costume for the Virgin Queen, and the Armada likeness is how she appears in the imagination of millions. It is worn by Glenda Jackson in the BBC classic *Elizabeth R* (Episode 5: 'The Enterprise of England', BBC2, aired 12 March 1972), and (anachronistically) by Cate Blanchett in the grand finale of Shekhar Kapur's *Elizabeth* (Universal Pictures, USA, 1998). Among the many accolades the film received were BAFTA and Academy Award nominations for Best Costume Design (Alexandra Byrne). During the promotional campaign for the film's sequel (S. Kapur, *Elizabeth: The Golden Age*, Universal Pictures, USA, 2007, which deals with the Armada and shows Elizabeth at Tilbury), Blanchett was portrayed by noted photographer Irving Penn (1917–2009) for Vogue, wearing a luxurious, updated version of the 'Armada' dress, designed by Nicolas Ghesquière (then with Balenciaga). Lucy Worsley, the Joint Chief Curator at Historic Royal Palaces, who has become a celebrity television presenter and populariser of British history, wriggles into a version of the dress in *Tales from the Royal Wardrobe* (BBC Four, aired 7 July 2014). Some four years earlier, David Dimbleby used the Woburn version of the Armada Portrait for the climactic moment of his telling of the story of Elizabeth, Drake and the rise of the British Empire (*Seven Ages of Britain*, Episode 3: 'Age of Power', BBC One, aired 14 February 2010).

Extracted from A. Ashot,
The Armada Portrait,
London: Christie's, 2015.

The Cultural Property (Armed Conflicts) Act

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During World War II, the looting and destruction of cultural property reached an extent never before seen, even in wartime. In response, the nascent international community came together to agree the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the '**Convention**'). The Convention lays down rules for the protection of cultural property in situations of armed conflict. It is supported by two Protocols. The first, also agreed in 1954, covers the protection of cultural property in occupied territories (the '**First Protocol**'). The second Protocol, agreed in 1999, extends and clarifies the obligations under the Convention and the First Protocol (the '**Second Protocol**').

There are currently 127 states parties to the Convention, not all of which are also parties to the Protocols. The UK signed the Convention in 1954, but has not yet ratified it. In 2004, the Labour government announced its intention to ratify the Convention and accede to the Protocols. That intention has remained the policy of succeeding administrations, and in May 2016 the current Conservative government promulgated a Bill that has now passed into law as the Cultural Property (Armed Conflicts) Act 2017 (the '**Act**'), having received royal assent on 23 February.

With all eyes firmly fixed on the immense peril facing the cultural heritage of large parts of the war-torn Middle East and Northern Africa in recent years, representatives of the UK antiquities trade have made clear that they warmly welcome the aims and objectives of the Act. However, the legislation has courted considerable controversy, particularly in relation to the new offence of dealing in unlawfully exported cultural property (the '**Dealing Offence**'). In the meantime, the Act certainly provides a fresh stimulus for participants in relevant cultural property markets to review, evaluate and, if necessary, devise and implement anew appropriate risk management policies and procedures.

What is 'cultural property'?

Article 1 of the Convention defines 'cultural property' very broadly to include moveable and immoveable property 'of great importance to the cultural heritage of every people'; works of art; manuscripts, books and other objects of artistic and archaeological interest; buildings such as museums, galleries, libraries and archives, as well as refuges intended to shelter cultural property in the event of an armed conflict; and 'centres containing a large amount of cultural property'.

The Act adopts the Convention's definition. Industry bodies such as the Antiquities Dealers' Association (the '**ADA**') and the British Art Market Federation (the '**BAMF**') have expressed concerns about its perceived imprecision. On the face of it, the Act could be read to protect many items whether or not they are of such 'great importance to the cultural heritage of every people'. The ADA has also questioned how its members are supposed to decide whether or not the definition applies to any given object or group of objects. The government has remained entirely unmoved by such concerns, save insofar as to offer the curious reassurance that it anticipates one prosecution every 30 years under the Act.

What is 'unlawfully exported cultural property'?

Under section 16 of the Act, property is 'unlawfully exported cultural property' if it is exported in breach of national or international law from a territory which either was occupied

at the time by a state that was a party to the First or Second Protocol, or is the territory of a state that was a party to the First or Second Protocol, and was occupied by another state. As Dr. Sophie Vigneron of Kent Law School brought to the attention of MPs considering the Bill in committee, this definition, oddly, would appear to exclude the many states that are party to the Convention itself, but not the Protocols. Again, such hopes as there may have been, that the Bill might be amended to resolve what might appear, on its face, something of an anomaly, have gone begging.

'Mens rea' of the Dealing Offence

Under section 17 of the Act, the Dealing Offence is committed if a person deals in unlawfully exported cultural property (if it was imported into the UK after 23 February 2017), knowing or having reason to suspect that it has been unlawfully exported. It is this last element – the 'mens rea' of the Dealing Offence, i.e. its 'mental component', or requisite state of mind – which has caused the most controversy to date, and is that aspect of the Act most likely to cause confusion in future.

It is universally accepted that a defendant who knows that cultural property was unlawfully exported will be guilty of the Dealing Offence. However, considerable concern has been expressed that the phrase 'having reason to suspect' could criminalise an honest but mistaken belief that an object was not unlawfully exported.

According to evidence given on behalf of the BAMF to the Committee of the House of Commons considering the Bill, '[a]n art dealer could genuinely not suspect that the items were unlawfully exported, but nevertheless be guilty because [objectively] he had reason to suspect and yet had not drawn the relevant conclusions from those reasons.' In other words, if a person has information that would lead a hypothetical 'reasonable' third party to a suspicion that an artefact has been unlawfully exported, but did not in fact form that suspicion herself, she risks being prosecuted for, and convicted of the Dealing Offence. With penalties of up to seven years' imprisonment and an unlimited fine, market participants are understandably anxious.

Sir Edward Garnier QC, MP and former Solicitor General, with the backing of many in the antiquities trade, proposed an amendment to the Bill to replace the words 'having reason to suspect' with 'believing' or 'suspecting'. If the amendment had been adopted, only defendants dealing in unlawfully exported cultural property who had at the time an actual suspicion or belief as to illegality would be liable for the offence. In support of a not dissimilar, alternative amendment, which would have made the test one of 'knowing or suspecting', Professor Janet Ulph of Leicester Law School pointed out that this would make the Act consistent with, for example, the test for money laundering offences under the Proceeds of Crime Act 2002.

Opponents of the Bill's 'reason to suspect' formulation argued that it creates uncertainty as to how much due diligence is ever enough. And they complained that an honest dealer might have no choice but to remove an object from sale, if (as sometimes occurs) an allegation is made casting doubt on the lawfulness of its export, thus giving rise to a 'reason to suspect', no matter how ill-founded such allegation might turn out to be. By then, however, the damage may have been done. An object withdrawn from sale in such circumstances could prove harder to sell subsequently.

The strong concern has been expressed that, as currently drafted, any new legislation could therefore have a serious chilling effect on the licit London market in art and antiquities, driving sellers to less scrupulous jurisdictions, even into the arms of illicit traders, and denying the Treasury tax revenues that might otherwise have been raised.

The ADA has also pointed out that, because the Act applies to any object first 'unlawfully exported' at any time after the Convention came into effect (in 1956), it has an element of 'retroactivity'. Although the Dealing Offence may only be committed in the case of objects and artworks imported into the UK after the date on which any legislation takes effect, a dealer could be caught out when dealing with an object imported from an ostensibly 'safe' source, if that object had in fact been 'unlawfully exported' from its state of origin at any point after 1956, for purposes of the Act.

Regrettably, not one of these serious concerns has been addressed by the government in the course of the legislative process, which has now issued in an Act that preserves the various mischiefs against which ample warning had been given.

Serious Violations under the Second Protocol

The Dealing Offence is not the only new offence created by the Act, section 3 of which implements Article 15 of the Second Protocol. Article 15 provides for certain '**Serious Violations**' in relation to cultural property in conflict zones.

The Serious Violations are divided into two categories. First, there are Serious Violations such as 'the extensive destruction or appropriation of cultural property', perpetrators of which can be prosecuted under the Bill for acts done anywhere in the world, regardless of their nationality. The second category of Serious Violations (e.g. the theft, pillage or misappropriation of cultural property) can only be prosecuted under the Act if committed by a UK national, or by somebody subject to UK service jurisdiction.

However improbable it may be that dealers in antiquities might personally commit any of the Serious Violations, section 4 of the Act provides for certain 'ancillary offences' giving rise to criminal liability. The offences are attempting or conspiring to commit a Serious Violation, and assisting the perpetrator of a Serious Violation or concealing the commission of a Serious Violation, as well as offences which are themselves ancillary to the ancillary offences. This would apply, for example, where a person had destroyed evidence in order to conceal an attempt by

Top
Ruins of the ancient city of Chersonesus, Sevastopol, Crimean Peninsula

Bottom
Panayla Kanakaria
6th century Byzantine church, originally containing Kanakaria mosaics, Lythrangomi, Cyprus

another to steal cultural property protected under the Convention. It is conceivable that, in certain circumstances, there might be a very fine line indeed between commission of the Dealing Offence, and an offence ancillary to a Serious Violation.

Under the Act, the Serious Violations and the offences ancillary to them are all punishable by a sentence of up to 30 years' imprisonment.

Liability of company officers for offences committed by a company

The offences under sections 3, 4 and 17 of the Act, described above, can all be committed by companies as well as natural persons. Under section 29, if a company is found guilty of any of those offences, and it is proved that the offence was committed with the 'consent or connivance' of any of its officers, those officers are guilty of the offence and liable to be proceeded against and punished accordingly. 'Officers' in this context means directors, managers and company secretaries, or any person purporting to act in such capacity. Moreover, if a company's shareholders manage the company's affairs, each of them could be treated as if they were an officer of the company, and held liable in the same way.

Although the Act does not define 'consent or connivance', Explanatory Notes to the Bill provide some guidance, stating that a company officer can be liable if she 'agrees to the offence that is committed…or assists with its commission by failing to prevent it'. This would suggest that company officers could be capable of committing the Dealing Offence not just by positive acts, but by omission as well. And it is far from clear quite how 'failing to prevent' might be assessed: would it require a specific failure to investigate relevant circumstances, for example, or might it even extend to failure to take preventative steps?

Comment

Much of the debate generated by the Bill concerned the low hurdle prosecutors were likely to be required to clear in the event that they had only to show that a person dealt in unlawfully exported cultural property knowing or having reason to suspect that she did so. The Bill's drafting having withstood the onslaught of criticism from advocates for, as well as supporters of art and antiquities trade interests, and other parties, it will now be imperative that all those dealing in cultural property affected by the new legislation ensure that their business practices adequately reflect the potential risks posed by implementation of the Act. Without taking reasonable steps to investigate the provenience and provenance of an object or artwork, a dealer may run the risk of becoming liable for the Dealing Offence. What is 'reasonable' in any given situation is likely to be heavily fact-dependent.

Given the risk that individual company officers, even business owners, may be held liable for management's sins – not just of commission, but potentially also omission – they may well wish to consider carefully the provision of training in appropriate preventative strategies for all relevant employees and agents. With prison sentences for the Dealing Offence of up to 7 years (and even 30 years, in relation to the Serious Violations), as well as unlimited fines, the price of non-compliance (potentially through mere inadvertence) has rarely been greater.

As a general point, each of the new offences created under the Act provides a strong reminder of the importance of sound record keeping. Keeping such records is not in itself a guaranteed solution. But the prospects of demonstrating reasonable due diligence, and hence prudent decision-making, are likely to be greater if there is a reliable paper trail than if there is no paper trail at all.

To close, it is worth noting that, amidst much discussion of what would and would not qualify as an 'occupied' territory for purposes of the Dealing Offence, and observations made to the effect that the Act will not serve to suppress the illicit export of cultural property from territory in the grip of ISIS and its various predecessors, proxies and fellow travellers, readers will no doubt be familiar with a number of existing provisions which do. The Dealing in Cultural Objects (Offences) Act 2003 and the Iraq (United Nations Sanctions) Order 2003 and Export Control (Syria Sanctions) (Amendment) Order 2014, for example, all remain in force, and in full effect. Indeed, the last two apply very similar standards of criminal intent to that which has proved so controversial amongst critics of the Act.

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